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No. 81-93

In the Supreme Court of the United States

OCTOBER TERM, 1980

ZIAD ABU EAIN, PETITIONER

v.

PETER WILKES, UNITED STATES MARSHAL FOR THE NORTHERN DISTRICT OF ILLINOIS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence at petitioner's extradition hearing was sufficient to support the magistrate's determination of probable cause.

2. Whether the court of appeals correctly upheld the magistrate's finding that petitioner is subject to extradition, notwithstanding his contention that the bombing of Israeli civilians by a member of the Palestine Liberation Organization—the crime with which he is charged—falls within the political offense exception in extradition law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-34) is reported at 641 F. 2d 504. The opinions of the district court (Pet. App. 35a-38a) and the magistrate (Pet. App. 39a-67a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 1981. A petition for rehearing was denied on April 13, 1981, and the petition for a writ of certiorari was filed on July 10, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The State of Israel has requested petitioner's extradition on charges of murder, attempted murder, and causing bodily harm with aggravating intent. Pursuant to Israel's request, petitioner was arrested in Chicago, Illinois, on

August 21, 1979. Following an extradition hearing before a magistrate in the United States District Court for the Northern District of Illinois, petitioner was determined to be subject to extradition for the named offenses (Pet. App. 39a-67a). Petitioner thereafter filed a petition for a writ of habeas corpus seeking to prevent his extradition. The petition was denied (Pet. App. 35a-38a), and the court of appeals affirmed (Pet. App. 1-34).

1. In 1963 the United States and Israel approved a bilateral extradition treaty providing for the extradition of persons charged with certain offenses, including murder and the infliction of grievous bodily harm. United States—Israel Convention on Extradition, Dec. 5, 1963, 14 U.S.T. 1707, T.I.A.S. No. 5476. Article V of the treaty provides that extradition shall be granted only if the asylum nation finds that the evidence would be sufficient to hold the accused for trial had the charged offense been committed in the asylum nation. Article VI exempts from extradition persons charged with an offense that is regarded by the asylum nation as one of a "political character." Pursuant to these two provisions and 18 U.S.C. 3184, the magistrate heard evidence on the questions whether there was probable cause to believe that petitioner had committed the charged offenses and whether those offenses were regarded by the United States as political.

a. To demonstrate probable cause, the United States introduced on behalf of Israel the sworn statements of three witnesses—petitioner's alleged co-conspirator Jamal Yasin, Yasin's cousin Mufida Jaber, and an Israeli police captain (G. Ex. 1 at 12, 19-20, 25-26). Their statements showed that Yasin recruited petitioner to join the Al Fatah branch of the Palestine Liberation Organization (PLO). On May 11, 1979, the two men travelled to Tiberias, a resort town in Israel, for the purpose of "reconnaissance." After walking about the market place and main streets of Tiberias, they returned to Yasin's home in Al Bireh, on the West Bank (G. Ex. 1 at 12; Pet. App. 68a-70a).

Three days later, on May 14, Yasin prepared an explosive charge, which petitioner agreed to plant in a refuse bin in Tiberias. Yasin instructed petitioner to avoid military vehicles on his mission. Petitioner departed alone from Yasin's home at 9:00 that morning and returned at 4:30 that afternoon. He reported to Yasin that he had placed the charge in the center of town and had set the timer for approximately 1:30 p.m. (G. Ex. 1 at 12-13; Pet. App. 70a-72a).

On May 14, 1979, at 2:50 p.m., a bomb exploded in a refuse bin near a bus stop in a congested market area of Tiberias. The explosion killed two young boys and injured more than 36 other civilians. That evening both Yasin and petitioner heard radio reports that their mission had succeeded (G. Ex. 1 at 25-29; Pet. App. 72a-73a).

Thereafter, upon learning of the arrest of a friend, Yasin warned petitioner that they were in danger. Two days later, Yasin sent petitioner a letter through Yasin's cousin, Mufida Jaber, stating that others had been caught and that petitioner should be careful. Petitioner told Ms. Jaber that he planned to go to the United States by way of Amman, Jordan (G. Ex. 1 at 13, 19; Pet. App. 73a, 76a-79a).

On May 20, 1979, only six days after the Tiberias bombing, petitioner obtained a visa for entry into the United States. He departed from Israel for Jordan on June 5, 1979, and arrived in Chicago on June 14, where he stayed with his sister and her husband. Two months later, pursuant to a request from Israel, FBI agents came to his sister's home to execute an arrest warrant charging petitioner with murder and causing bodily harm. Petitioner gave a false name but accompanied the agents to FBI headquarters for fingerprints and photographs. Petitioner was arrested a few days later, after the agents had matched his prints with prints sent from Israel. When the agents mistakenly told petitioner that he was wanted in Jordan, petitioner corrected them, saying "It's the Israeli's [*sic*], not the Jordanians that want me" (Pet. App. 6-7; Tr. 15-25, 1398-1405).

At the hearing, petitioner sought to introduce affidavits of Yasin and Jaber recanting their confessions to the Israeli police. He also proffered 11 affidavits of friends, family, and a physician to establish an alibi for his whereabouts on the day of the bombing. None of these affidavits was admitted into evidence (Pet. App. 9-10, 51a-54a).

b. With respect to the question whether the offenses charged were regarded by the United States as of a "political character," Assistant Legal Adviser Louis Fields, Jr., an authorized spokesman for the Department of State, testified (Tr. 1041):

> It is the view of the Department of State that indiscriminate use of violence against civilian populations, innocent parties is a prohibited act and as such, is a common crime of murder. And it is punishable in both states.

His opinion was echoed in the statements of Assistant Legal Adviser Knute Malmborg and past and present high ranking government officials (see, *e.g.*, G. Exs. 10, 15, 17-19). Professor William Mallison Jr., testifying on behalf of petitioner, agreed with the other witnesses that bombing innocent civilians is an act of terrorism (Tr. 904) and that such a crime should not fall within the political offense exemption (Tr. 867).

2. The magistrate found probable cause to believe that petitioner was responsible for the death and injury of the victims of the Tiberias bombing (Pet. App. 45a-46a). She also found that the crimes charged did not fit within the political offense exception (Pet. App. 65a-66a):

> Accepting that [petitioner] was a member of a P.L.O. organization and with motivation toward its political objective, there is nothing in the evidence which "tends" to show that this act was directed in opposition to the State of Israel and that the crime

> furthered the cause of his group objective. He has not shown the relation between these crimes, the method of their commission and the political objective. The random and indiscriminate placing of an explosive near a bus stop on a public street in any trash bin defuses any theory that the target was a military one or justified by any military necessity. It was an isolated act of violence. The commission of these alleged offenses is so remote from the political objective that it could not reasonably have been believed by the offender to have a direct political effect on the government of Israel; nor was it directed at the government of Israel.

She thus certified petitioner as subject to extradition.[1] For the reasons stated in the magistrate's opinion, the district court denied the petition for a writ of habeas corpus (Pet. App. 35a-38a).

The court of appeals affirmed (Pet. App. 1-34). It upheld the magistrate's probable cause determination as based on sufficient evidence (*id.* at 5-11). It noted that the statements of Yasin, the confessed accomplice, were against his penal interest and were corroborated by other evidence, including petitioner's own acts (*id.* at 7-9). It further held that the recantations of Yasin and Jaber and petitioner's alibi affidavits were properly excluded because they come within the category of evidence contradicting or challenging the credibility of the prosecution case—evidence which is properly considered in a full-scale trial at which guilt or innocence is determined, not in a hearing to determine only the existence of probable cause (*id.* at 9-11).

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[1]The Department of State may still refuse to extradite petitioner if it believes that Israel seeks his return "with a view to trying or punishing him for an offense of a political character," that is, an offense other than murder and causing bodily harm. United States-Israel Convention on Extradition, Dec. 5, 1963, Art. VI, para. 4, 14 U.S.T. 1707, 1710, T.I.A.S. No. 5476.

The court concluded that it had jurisdiction to decide the question whether the crime charged against petitioner is a political offense and thus not a basis for extraditing petitioner under the treaty (Pet. App. 12-23). Accepting, for the purposes of its decision, that a conflict existed between the PLO and Israel, the court nonetheless rejected petitioner's "political offense" argument, holding that "indiscriminate bombing of a civilian populace is not recognized as a protected political act" even when the person who carries out the bombing is committed to a larger political objective (*id.* at 27-28).

ARGUMENT

1. Petitioner contends (Pet. 8-13) that Yasin's confession was inherently unreliable and should not have been credited by the magistrate. Accordingly, he contends, the magistrate's finding of probable cause was not supported by sufficient evidence.[2] He also argues (Pet. 21-23) that the district court should have admitted Yasin's and Jaber's recantations and the alibi affidavits at the extradition hearing. These claims are without merit.

The magistrate's probable cause determination in an extradition hearing must be sustained if "there [is] any evidence warranting the finding that there was reasonable ground to believe the accused guilty." *Fernandez* v. *Phillips*, 268 U.S. 311, 312 (1925); *Escobedo* v. *United States*, 623 F. 2d 1098, 1101 (5th Cir.), cert. denied, No. 80-751 (Dec. 8, 1980). In the instant case, the evidence was ample. Petitioner does not deny that the bombing occurred.

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[2]Petitioner does not deny that probable cause is the appropriate standard of proof for an extradition hearing. See *Fernandez* v. *Phillips*, 268 U.S. 311, 312 (1925); *Collins* v. *Loisel*, 259 U.S. 309, 314-315 (1922); *In re Assarsson*, 635 F. 2d 1237, 1246 (7th Cir. 1980), cert. denied, No. 80-1423 Apr. 27, 1981); *Shapiro* v. *Ferrandina*, 478 F. 2d 894, 905 (2d Cir.), cert. dismissed, 414 U.S. 884 (1973).

Yasin's statement named petitioner as the person who placed the explosive charge in the Tiberias refuse bin. His statement was corroborated by Mufida Jaber, who delivered messages to petitioner after the incident warning him to be careful. It was also corroborated by petitioner's flight to America, his evasive conduct upon execution of the arrest warrant, and his admission to the FBI agents that Israel rather than Jordan was seeking his extradition.

Petitioner nevertheless suggests that Yasin's and Jaber's statements must be discredited because they were written in Hebrew, and therefore Yasin and Jaber, both Arabs, could not have understood what they were signing. But, as the court of appeals observed, the statements were sworn to be true and correct before an Arabic speaking judge in Jerusalem (G. Ex. 1 at 34). "The judge conversed with Yasin and Jaber in their native Arabic and determined that the witnesses understood their statements and that the statements were made of their own free will" (Pet. App. 10).[3]

Neither were the recantations of Yasin and Jaber, which were given to petitioner's attorneys, a reason for finding that their statements to the Israeli authorities did not adequately support the probable cause finding.[4] The magistrate

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[3]Petitioner's statement (Pet. 9) that Yasin's confession was taken under "inherently coercive circumstances" is speculative and not supported by the record. As stated above, an Israeli judge questioned Yasin and determined that the confession was freely given. Moreover, in Yasin's recantation, he explains that he implicated petitioner "because I was sure that he was outside the country, and that it was impossible to arrest him or cause him any harm due to my earlier statements against him" (Pet. App. 82a-83a). Yasin does not allege that he inculpated petitioner in response to torture or other coercion. There is no reason to believe that letters rogatory would provide an explanation other than the one Yasin gave to petitioner's attorneys in his affidavit.

[4]We note that in Yasin's recantation appended to the petition, Yasin does not deny having implicated petitioner in his original sworn statement. Rather he admits that he did so but states that he was lying at the time (Pet. App. 82a-83a).

was not required to consider the recantations. The question which of these witnesses' conflicting statements is true is to be resolved at trial in Israel. *Collins* v. *Loisel*, 259 U.S. 309, 316-317 (1922). The only question for the magistrate was "whether the evidence for the State [of Israel made] a *prima facie* case of guilt sufficient to make it proper to hold [petitioner] for trial." *Charlton* v. *Kelly*, 229 U.S. 447, 461 (1913). Yasin's statement, together with the other corroborating evidence, was sufficient to meet this probable cause standard. Cf. *United States* v. *Calandra*, 414 U.S. 338, 343 (1974).

The affidavits establishing an alibi for petitioner were also properly excluded by the magistrate. See *Charlton* v. *Kelly, supra*, 229 U.S. at 461; *Shapiro* v. *Ferrandina*, 478 F. 2d 894, 904-905 (2d Cir.), cert. dismissed, 414 U.S. 884 (1973). As petitioner candidly concedes (Pet. 22), "[o]rdinarily alibi evidence should not be admitted in a probable cause hearing." To hold otherwise would require Israel to engage in a trial on the merits in the United States. Israel would not be able to obtain extradition until it " 'had procured a conviction of [petitioner] upon a full and substantial trial here.' " *Collins* v. *Loisel, supra*, 259 U.S. at 316, quoting *In re Wadge*, 15 F. 864, 866 (S.D.N.Y. 1883). Accord, *Shapiro* v. *Ferrandina, supra*, 478 F. 2d at 902, 904-905. The magistrate was correct in limiting the scope of the hearing to determine whether Israel had established a prima facie case.

2. Contrary to the conclusion of the court of appeals (Pet. App. 12-23), we believe that the Secretary of State has sole discretion to decide whether the offense charged against an individual whose extradition is sought is a political offense within the terms of the applicable treaty.[5] We

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[5]The court of appeals acknowledged, however (Pet. App. 13; citations omitted), that it is solely for the determination of the Secretary of State whether, even assuming the offense charged is nonpolitical, "a

agree, however, that assuming the question is judicially reviewable, the courts below correctly concluded that the PLO bombing of civilians in Tiberias was not "an offense of a political character" exempting petitioner from extradition under the terms of Article VI, para. 4 of the convention between the United States and Israel.

Historically, political offenses were the principal crimes for which extradition was sought; but in the nineteenth century a growing sympathy for revolutionaries who sought to overthrow tyrannical governments led to the development of the political offense exception found today in many extradition treaties. See generally M. Bassiouni, "The Political Offense Exception in Extradition Law and Practice," *reprinted in International Terrorism and Political Crimes* 398-405 (M. Bassiouni ed. 1975); Lubet & Czackes, *The Role of the American Judiciary in the Extradition of Political Terrorists*, 71 J. Crim. L. & Criminology 193, 194-195 (1980); Epps, *The Validity of the Political Offender Exception in Extradition Treaties in Anglo-American Jurisprudence*, 20 Harv. Int'l L.J. 61-74 (1979); Note, *Terrorist Extradition and the Political Offense Exception: An Administrative Solution*, 21 Va. J. of Int. L. 163, 166-170 (1980). A two-fold exception was instituted under the belief that asylum should be granted (a) to persons charged with purely political crimes, such as treason, sedition, and espionage and (b) to persons charged with common crimes committed during the course of and in furtherance of "a political revolt, an insurrection or a civil war." *Ornelas* v. *Ruiz*, 161 U.S. 502, 511 (1896). See also M. Bassiouni, "The Political Offense Exception in Extradition Law and Practice," *supra*, at 405-412; Note, *supra*, 21 Va. J. Int'l L. at 164.

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country's requisition for extradition is made with a view to try or punish the fugitive for a political crime, i.e., whether the request is a subterfuge."

We question whether even bombings by PLO members aimed at government or military personnel would qualify for the political offense exception. Whatever the resolution of that question, however, the acts charged here clearly do not qualify. The commentators and the courts generally agree that the political offense exception should not be extended to terrorists who commit random acts of violence aimed at innocent civilian populations.[6] The mere fact that a terrorist is motivated by a desire to seek publicity for a political cause does not transform his common crime into a political offense. At the very least, the act must be "committed in the course of *and incidental to* a violent political disturbance." *Escobedo* v. *United States, supra*, 623 F. 2d at 1104 (emphasis added). As one commentator has stated (Lubet & Czackes, *supra*, 71 J. Crim. L. & Criminology at 194-195):

> Certain acts of violence, * * * existing at the fringe of legitimate revolution, challenge the conscionability of protecting such activities from extradition and punishment. It is the objective of the political offense exception to protect those violent acts which are necessary and corollary to political activity, not to sanction gratuitous assaults on human life.

Contrary to implications of petitioner's argument with respect to certain rejected evidence (Pet. 5-7, 21-22), both courts below accepted his assertions that he was a member of the PLO and that a conflict existed between the PLO and

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[6]There is no conflict among the circuits on this issue. The opinion on which petitioner relies (Pet. 15), *Karadzole* v. *Artukovic*, 247 F. 2d 198 (9th Cir. 1957), was vacated by this Court. 355 U.S. 393 (1958). On remand, the district court determined that Artukovic was not subject to extradition because a prima facie case of his guilt had not been established. *United States* v. *Artukovic*, 170 F. Supp. 383 (S.D. Cal. 1959). In dictum, the court stated (*id.* at 392-393) that the crimes charged (the extermination of more than 200,000 civilians during the Nazi occupation of Yugoslavia in World War II) were political offenses and exempt from extradition.

Israel.[7] Both courts, however, correctly found that petitioner had failed to show a sufficient connection between the conflict and the isolated, ruthless murder of two young boys (Pet. App. 27, 59a-65a). The bombing was not incidental to a rebellion against the Israeli government; it was a malicious act directed at civilians that could not reasonably have been expected to further the cause of the PLO. Accordingly, the magistrate's determination that petitioner is subject to extradition is both substantively correct and without procedural infirmity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1981

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[7]Petitioner contends (Pet. 22) that he should have been permitted to introduce additional evidence describing "the state of war between Israel and the PLO, the purposes and acts of the PLO, the people involved in armed resistance, the types of violence experienced, the nature and frequency of bombings in Israel, the uses of torture and denials of fair trials." But none of this evidence could validate an act of terrorism directed at civilians. No matter how favorable to the accused the proffered evidence might have been (*e.g.*, that many members of the PLO commit such acts in Israel), he or any other individual charged with the random and deliberate killing of innocent civilians would still properly be found subject to extradition.